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Supreme Court, U.S.
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No. 03-992

In the Supreme Court of the United States

ELBERT HATCHETT AND LAURESTINE HATCHETT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government's authority under 26 U.S.C. 6335 to conduct an administrative sale of property upon which it has levied under 26 U.S.C. 6331 is limited to property that belongs to the delinquent taxpayer or is subject to a federal tax lien.

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In the Supreme Court of the United States

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PETITIONERS

v.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 330 F.3d 875. The opinion of the district court (Pet. App. 24a-50a) is reported at 126 F. Supp. 2d 1038.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2003. A petition for rehearing was denied on September 30, 2003 (Pet. App. 23a). The petition for a writ of certiorari was filed on December 29, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 6321 of the Internal Revenue Code, 26 U.S.C. 6321, provides:

> **Lien for taxes.**
>
> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Section 6331 of the Internal Revenue Code, 26 U.S.C. 6331, provides in relevant part:

> **(a) Authority of Secretary.**
>
> If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax * * * by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. * * *
>
> **(b) Seizure and sale of property.**
>
> The term "levy" as used in this title includes the power of distraint and seizure by any means. * * * In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

Section 6335(c) of the Internal Revenue Code, 26 U.S.C. 6335(c), provides in relevant part:

> **Sale of indivisible property.**
>
> If any property liable to levy is not divisible, so as to enable the Secretary by sale of a part thereof to raise the whole amount of the tax and expenses, the whole of such property shall be sold.

STATEMENT

1. Petitioners Elbert and Laurestine Hatchett are husband and wife. Pet. App. 1a. On various dates between October 1978 and September 1992, the Internal Revenue Service (IRS) made assessments against Mr. Hatchett for federal income taxes and penalties for the years 1975 through 1991, which Mr. Hatchett failed to pay. See C.A. App. 191. As a result, the government obtained tax liens for those liabilities "upon all property and rights to property, whether real or personal, belonging to" Mr. Hatchett. 26 U.S.C. 6321. In October 1994, in an attempt to collect Mr. Hatchett's delinquent tax liabilities, which totaled more than $6.6 million by that time, the IRS levied upon four parcels of real estate and issued notices of seizure and sale at public auction under 26 U.S.C. 6335. See Pet. App. 3a; C.A. App. 69, 191.

At the time of the levy, petitioners owned two of the properties (their principal residence and a car wash) as tenants by the entirety. See Pet. App. 3a. Mrs. Hatchett held title to the third property, which had been quit-claimed to her in 1984 for no consideration by petitioners as tenants by the entirety. See *ibid.*; C.A. App. 232-234, 329. During the time that Mr. Hatchett's assets were subject to the tax liens, he made contributions, in the form of land contract or mortgage

payments and payments for improvements, to those three properties. See *id.* at 99. Mr. Hatchett owned the fourth property, which is not in issue here. See Pet. App. 46a (noting that petitioners withdrew their wrongful levy action regarding that property).

In January 1995, the IRS also levied upon payments due to petitioners under a mortgage on a fifth parcel of real estate. That parcel had been held by petitioners as tenants by the entirety before they sold it and took back the mortgage in 1991. See Pet. App. 3a-4a; C.A. App. 70.

2. Petitioners commenced this wrongful levy action against the United States to enjoin the sale of the properties and the seizure of the mortgage payments. See Pet. App. 4a. Petitioners argued that the levies were wrongful because the properties (including the mortgage) were either owned by them as tenants by the entirety or were owned individually by Mrs. Hatchett. See *id.* at 25a.

The government contended that, although a tenancy by the entirety is exempt under state law from execution by a creditor of only one spouse, the federal tax liens still attached to Mr. Hatchett's underlying interests in the properties, such as his rights of possession and survivorship. Those property interests, the government argued, were therefore subject to levy. See C.A. App. 65, 100 n.1. The government also argued that the federal tax liens against Mr. Hatchett attached to, and were traceable against, all contributions that he had made to the properties after the government acquired the liens. Therefore, the government argued, the extent of the government's liens and its authority to levy should be determined by Mr. Hatchett's contributions to the properties. See *id.* at 100; Pet. App. 21a, 48a. The government further argued that Mr. Hatchett

was the true beneficial owner of the properties, and that petitioners, in their capacity as tenants by the entirety, held title only as Mr. Hatchett's nominees. See *id.* at 21a, 48a. Finally, the United States sought to amend its answer to assert that petitioners had fraudulently conveyed the properties into tenancies by the entirety in order to evade or defeat the payment of Mr. Hatchett's delinquent tax liabilities. See *id.* at 15a-16a, 49a; C.A. App. 100-101, 162.

3. The district court refused to allow the government to pursue its lien tracing and nominee theories or to amend its answer to assert a fraudulent conveyance defense. See C.A. App. 164-165; Pet. App. 32a. At the parties' request, the district court then stayed the wrongful levy action pending the Sixth Circuit's decision in *Craft* v. *Commissioner*, 140 F.3d 638 (1998), which involved the issue whether a federal tax lien can attach to the property interests of one of the spouses in property held in a tenancy by the entirety. See Pet. App. 33a.

After the Sixth Circuit handed down its decision in *Craft*, the district court concluded that the levies were wrongful. Pet. App. 24a-50a. The district court relied upon the Sixth Circuit's holding in *Craft* that, "[b]ecause Michigan law does not recognize one spouse's separate interest in an entireties estate, a federal tax lien against one spouse cannot attach to property held by that spouse as an entireties estate." Pet. App. 47a-48a (quoting *Craft*, 140 F.3d at 643). The district court also reiterated its earlier decision that the government could not assert its fraudulent conveyance argument. *Id.* at 49a. Finally, the court rejected the government's lien tracing and nominee theories as unpersuasive. *Id.* at 48a; see *id.* at 21a.

4. The government appealed. While the appeal was pending, this Court granted the government's petition for a writ of certiorari in *Craft* and reversed the Sixth Circuit's holding in that case. See Pet. App. 2a, 6a-9a. This Court agreed with the government that a taxpayer has an interest in property held in a tenancy by the entirety to which a federal tax lien may attach. See *United States* v. *Craft*, 535 U.S. 274 (2002).

The court of appeals thereafter reversed and remanded this case for further proceedings. Pet. App. 1a-22a. The court reasoned that, under this Court's decision in *Craft*, the federal tax lien arising under 26 U.S.C. 6321, which attaches to "all property and rights to property, whether real or personal," held by the delinquent taxpayer, attaches to the taxpayer's interest in property held in a tenancy by the entirety. See Pet. App. 6a-9a. The court of appeals further observed that "the inclusion of entireties property in the definition of 'all property and rights to property' in [Section] 6321 is directly applicable to [Section] 6331(a), which allows for the Government to collect unpaid taxes by administrative levy of 'all property and rights to property . . . belonging to such person or on which there is a lien.'" Pet. App. 9a (quoting 26 U.S.C. 6331(a)). Because "[t]he scope of the federal lien and the scope of the levy are identical and interests subject to a federal tax lien are also subject to an administrative levy," the court of appeals held that the levies in this case were proper. *Ibid.* Addressing the government's authority to sell the property upon which it had levied at public sale under 26 U.S.C. 6335, the court of appeals held that:

> [t]he power to levy includes the power to seize and sell these properties as prescribed by [Section] 6335;

> property that cannot be divided in order to satisfy the whole of taxes and expenses shall be sold in its entirety. * * * [Mr. Hatchett's] outstanding tax indebtedness * * * far exceeds the value of his interests in the entireties properties. Accordingly, the Government is entitled to sell the whole of the properties and collect a portion of the proceeds pursuant to [Section] 6335(c).

Pet. App. 14a.

The court of appeals also rejected petitioners' contention that the case should be remanded for the district court to determine, based on equitable considerations, whether the sale should go forward. Pet. App. 14a-15a. The court of appeals agreed that *United States* v. *Rodgers*, 461 U.S. 677 (1983), establishes that, when the government seeks to sell property in a civil action under 26 U.S.C. 7403, the district court adjudicating that action must make a discretionary determination about whether the sale should go forward. The court of appeals explained, however, that, as this Court described in *Rodgers* itself, "a [Section] 7403 proceeding is wholly different from an 'administrative levy under 26 U.S.C. [Section] 6331.'" Pet. App. 15a (quoting *Rodgers*, 461 U.S. at 682). The court of appeals concluded that, "[a]ccordingly, under *Craft* the Government is able to sell [petitioners'] entireties properties and collect the mortgage payments." *Ibid.*

The court of appeals also agreed with the government that the district court had erred in refusing to allow the government to pursue its fraudulent conveyance theory and in failing to give adequate consideration to the government's lien tracing and nominee defenses. Pet. App. 15a-22a. In light of this Court's decision in *Craft*, the court of appeals observed, the lien

tracing and nominee theories "are relevant in determining the Government's interest in the entireties properties and mortgage payments at issue." *Id.* at 22a. The court therefore held that the government was "entitled to present its nominee and lien tracing theories on remand in order to determine the exact value of the Government's interests." *Ibid.* The court remanded the case for further proceedings on all three theories. *Id.* at 21a-22a.

5. The government subsequently filed a motion to amend the court of appeals' opinion. The government asked the court to eliminate the statement that the government is entitled under Sections 6331 and 6335 to sell more than Mr. Hatchett's interest in the properties or other interests to which the government's liens have attached. Pet. App. 51a-54a. The government explained that it is "highly doubtful" whether Section 6335(c) "allows the Government to sell property that neither belongs to the taxpayer nor is property on which there is a lien." *Id.* at 52a. The government further stated that it has never sought in this case to sell, pursuant to the administrative sale provisions, more than the property upon which it levied, which is only Mr. Hatchett's interest in the parcels or interests to which the government's liens have attached. See *id.* at 53a.

Petitioners filed a petition for a writ of certiorari before the court of appeals acted on the government's motion to amend the opinion. On December 31, 2003, after petitioners had filed their petition, the court of appeals granted the government's motion to amend the court's opinion. App., *infra*, 1a-4a. On January 5, 2004, the court of appeals sent the parties and the legal publishers a copy of the corrected page of its opinion, reflecting the deletion from the opinion of the following

sentence: "Accordingly, the Government is entitled to sell the whole of the properties and collect a portion of the proceeds pursuant to § 6335(c)." *Id.* at 4a.

ARGUMENT

This case no longer presents the issue raised in the petition for a writ of certiorari, because the court of appeals has deleted from its opinion the crucial passage stating that the government can sell the whole of the entireties properties. Indeed, there is no ongoing controversy on the question presented by petitioners, because petitioners, the government, and the court of appeals all agree that, under 26 U.S.C. 6331 and 6335, the government can sell only property belonging to the delinquent taxpayer or to which a federal tax lien has attached. Moreover, the court of appeals' opinion, as amended, is correct and does not conflict with any decision of this Court or any other court of appeals. In any event, because of the interlocutory posture of this case, the case is not currently ripe for review by this Court. Further review is therefore not warranted.

1. Under 26 U.S.C. 6321, if a taxpayer does not pay an assessed tax after notice and demand, a lien in favor of the United States in the amount of the delinquency arises "upon all property and rights to property, whether real or personal," belonging to the taxpayer. See *United States* v. *Craft*, 535 U.S. 274, 276 (2002); *United States* v. *National Bank of Commerce*, 472 U.S. 713, 719 (1985). The federal tax lien is not self-executing, *id.* at 720, but Congress has granted the government a number of remedies to enforce the lien. For example, the government may sue to foreclose on its lien under 26 U.S.C. 7403. See *United States* v. *Rodgers*, 461 U.S. 677, 682 (1983). Alternatively, 26 U.S.C. 6331(a) empowers the government to collect a

delinquent tax "by levy upon all property and rights to property * * * belonging to [the taxpayer] or on which there is a lien provided in [Section 6321]." Under 26 U.S.C. 6331(b), in any case where the government may levy, it may seize and sell the property administratively, without judicial intervention. *Rodgers*, 461 U.S. at 682-683; see 26 U.S.C. 6335. And, under 26 U.S.C. 6335(c), "[i]f any property liable to levy is not divisible, so as to enable the Secretary by sale of a part thereof to raise the whole amount of the tax and expenses, the whole of such property shall be sold."

Petitioners acknowledge (Pet. 5) that, under Sections 6331 and 6335, the government may conduct an administrative sale of Mr. Hatchett's interest in the entireties properties. They contest and seek review only of the suggestion in the court of appeals' initial opinion that the government may sell not only Mr. Hatchett's interest but the whole of entireties properties, including any portion that legitimately belongs to Mrs. Hatchett. See Pet. i-ii, 5, 18. The petition was filed, however, before the court of appeals amended its opinion to delete the sentence stating that "the Government is entitled to sell the whole of the properties and collect a portion of the proceeds pursuant to § 6335(c)." App., *infra*, 4a. As amended, the opinion no longer holds that the government may sell the whole of the properties. This case therefore no longer presents the issue on which petitioners seek this Court's review.

Indeed, there is no ongoing controversy concerning that issue. Petitioners, the government, and the court of appeals all agree that the government may not sell any interest in the properties that Mrs. Hatchett holds as the non-liable tenant by the entirety and that is not subject to the government's tax lien by virtue of the government's lien tracing, nominee, or fraudulent con-

veyance claims. In fact, as noted in the government's motion to amend the court of appeals' initial opinion, the government "has never sought in this case to sell, pursuant to the administrative sale provisions of Section 6335, more than what it levied upon, namely [Mr. Hatchett's] interest in the three parcels in question, or interests to which [the government's] liens have attached." Pet. App. 53a. Accordingly, there is no occasion for this Court to address whether the government has any power to do so.[1]

2. As amended, the court of appeals' opinion is correct and does not conflict with any decision of this Court or of any other court of appeals. The court of appeals correctly held that this Court's recent decision in *United States* v. *Craft*, 535 U.S. 274 (2002), makes clear that the federal tax lien that arises under 26 U.S.C. 6321 may attach to a taxpayer's interest in property held in a tenancy by the entirety. See 535

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[1] The amended opinion still contains a sentence stating in part that "the Government is able to sell the Hatchetts' entireties properties." Pet. App. 15a. That sentence would be more accurate if it stated that "the Government is able to sell Mr. Hatchett's interest in the entireties properties." Read in context, however, the sentence is not intended to hold that the government can sell more than Mr. Hatchett's interest or interests otherwise subject to the federal tax lien. Rather, the sentence merely serves as the conclusion to a paragraph rejecting petitioners' argument that there could be no sale under Sections 6331 and 6335 unless the district court determined that it was equitable for the sale to go forward—an argument petitioners do not press in this Court. That interpretation of the sentence is the only plausible one, because the court of appeals granted the government's motion to strike from the opinion the statement that the government could sell the whole of the properties, and the government has disavowed any authority to sell more than Mr. Hatchett's interest or interests otherwise subject to the lien.

U.S. at 276. The taxpayer's interest in the entireties property constitutes "property" and "rights to property" of the taxpayer under Section 6321 to which the lien attaches. See *id.* at 288. The court of appeals further correctly held that the "the inclusion of entireties property in the definition of 'all property and rights to property' in [Section] 6321 is directly applicable to [Section] 6331(a), which allows for the Government to collect unpaid taxes by administrative levy of 'all property and rights to property . . . belonging to such person or on which there is a lien.'" Pet. App. 9a (quoting 26 U.S.C. 6331(a)). As the court of appeals explained, "[t]he scope of the federal lien and the scope of the levy are identical." *Ibid.* Thus, "interests subject to a federal tax lien are also subject to an administrative levy" and sale under 26 U.S.C. 6331 and 6335. Pet. App. 9a.

That holding does not conflict with any of the decisions cited by petitioners. Petitioners' claims of conflict (Pet. 8-17) are based on the premise that the court of appeals held that the government could use the administrative levy and sale process to sell property that legitimately belongs to someone other than the taxpayer (in this case the taxpayer's spouse) and is not subject to the government's lien. As explained above, however, the court of appeals' amended opinion does not so hold. Therefore, even assuming that the cases cited by petitioners stand for the proposition that the government cannot use the administrative sale process to sell property that legitimately belongs to third parties and is not subject to the government's tax lien, the amended opinion of the court of appeals does not conflict with those cases.

3. Even if the court of appeals' opinion did present the question raised in the petition or a conflict with a

decision of this Court or some other court of appeals, review by this Court would be premature because of the interlocutory posture of the case. The court of appeals remanded the case for the government to be given the opportunity to prove that Mrs. Hatchett's interests in petitioners' properties were fraudulently conveyed to her, are held by her merely as Mr. Hatchett's nominee, or were acquired with funds of his to which federal tax liens had already attached. Any of those contentions, if proven, would defeat Mrs. Hatchett's claim to a protected interest in the entireties properties and would eliminate any question that might otherwise be presented about whether Sections 6331 and 6335 authorize the government to seize and to sell property that does not belong to the delinquent taxpayer and is not subject to a federal tax lien.

There is no extant ruling permitting the sale of any interest in property that Mrs. Hatchett claims to own, and none will issue unless and until the government prevails on its alternative theories in the district court. In that event, Mrs. Hatchett would have a right to appeal that decision to the court of appeals, and, if she were to lose her appeal, to petition this Court for a writ of certiorari to decide any issues that the case might then present. Until that time, however, the case is not ripe for review. The petition for a writ of certiorari should be denied for that reason alone. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2004

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-1645

ELBERT L. HATCHETT AND LAURESTINE HATCHETT,
PLAINTIFFS-APPELLEES

v.

UNITED STATES OF AMERICA,
DEFENDANTS-APPELLANT

Filed: Dec. 31, 2003

ORDER

Upon consideration of the appellant United States' motion to amend the court's decision, specifically language on page 13 of the slip opinion, the motion is GRANTED.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
LEONARD GREEN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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January 5, 2004

Joan I. Oppenheimer
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Re: Case No. 00-1645
Elbert and Kaurestine Hatchett v. United States of America
District Court No. 94-74708

Dear Counsel:

Enclosed is a copy of a corrected page from the decision originally sent to you June 4, 2003. Please make corrections in your publication version as indicated on page 13, lines 11, 12, and 13.

Thank you for your cooperation in this matter.

Yours very truly,

Leonard Green, Clerk

By LINDA K. MARTIN
(MRS.) LINDA K. MARTIN
Deputy Clerk

LKM/swh
Enclosure

cc: Honorable Denise Page Hood
Mr. John P. Meyer, Clerk
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Tax Analysts
Ohio Lawyers Weekley

prescribed by § 6335; property that cannot be divided in order to satisfy the whole of taxes and expenses shall be sold in its entirety." *Craft* allows the Government to levy upon the West Hickory, Franklin Boulevard, and South Saginaw properties held by the Hatchetts as tenants by the entirety. In 1998, the taxable value of these properties was estimated as follows: (1) West Hickory at $544,400, (2) Franklin Boulevard at $19,720; and (3) South Saginaw at $60,480. Elbert's outstanding tax indebtedness in excess of $8,000,000 far exceeds the value of his interests in the entireties properties. ~~Accordingly, the Government is entitled to sell the whole of the properties and collect a portion of the proceeds pursuant to § 6335(c).~~

The Hatchetts, relying on the Supreme Court's decision in *Rodgers*, also argue that even if the Government is entitled to sell the entireties property, we should remand the case to the district court for consideration by that court of whether the sale should be allowed to go forward. The Hatchetts' reliance on *Rodgers* is misplaced. The Court in *Rodgers* decided that a Texas homestead law did not prevent the Government from forcing the sale of a family house to satisfy tax indebtedness. 461 U.S. at 680. The Government chose to pursue the taxpayer in *Rodgers* under 26 U.S.C. § 7403 (2002), which authorizes the Government to pursue a taxpayer by filing a civil action in a district court for the payment of delinquent taxes. In a proceeding under § 7403, the district court adjudicates all the matters involved, makes a final determination of the claims, and decrees a sale of the property if the Government's claim is established. § 7403 (c). In explaining that a court in a § 7403 proceeding is charged with exercising its discretion regarding the sale of levied property, the Court in *Rodgers* held that several factors should be considered by the district court in deciding whether to authorize the forced sale. 461 U.S. at 710-11.

As the Court explained in *Rodgers*, a § 7403 proceeding is wholly different from an "administrative levy under 26 U.S.C. § 6331." 461 U.S. at 682. An action under § 6331, the Court noted, is "unlike the procedure described in § 7403, [and]